

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

<p>In the Matter of the</p> <p>Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule To LEC-IXC Traffic</p>	<p>CC Docket No. 01-92 WC Docket Nos. 10-90 and 14-228</p>
--	--

COMMENTS OF SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

TABLE OF CONTENTS

1.	Background.....	3
2.	The IntraMTA Rule and IXCs.....	6
3.	The IXCs' Requests for Refunds.....	9
4.	Unlawful Self-Help by IXCs	10
	Conclusion.....	13

Appendix A

Appendix B

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of the

Petition for Declaratory Ruling Regarding
Applicability of the IntraMTA Rule To
LEC-IXC Traffic

CC Docket No. 01-92
WC Docket Nos. 10-90 and 14-228

COMMENTS OF SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

The South Dakota Telecommunications Association (“SDTA”)¹ hereby respectfully submits these comments in response to the December 10, 2014, Public Notice issued by the Wireline Competition Bureau seeking comment on the pending “Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic, CC Docket No. 01-92 and WC Docket Nos. 10-90 and 14-228 (the “Petition”). The parties filing that Petition (the “Petitioners”) have requested that the Federal Communications Commission (the “Commission”) clarify the scope of its “intraMTA rule” and confirm that such rule “does not apply to a local exchange carrier’s (“LEC”) charges to an interexchange carrier (“IXC”) when the IXC terminates or receives traffic from a LEC via tariffed switched access services.”² The Petitioners specifically request that the Commission confirm the following statements:

1. Even though intraMTA traffic is non-access traffic in the context of direct billing from a LEC to a CMRS provider, any traffic that is voluntarily routed by means of a LEC’s tariffed switched access facilities outside of an ICA (or

¹ SDTA is an incorporated organization representing the interests of numerous cooperative, independent and municipal rural rate-of-return carriers operating in the State of South Dakota. A listing of SDTA’s current rural incumbent local exchange carrier members is attached as Appendix A.

² See Public Notice at p. 1 (quoting *Petition for Waiver of Bright House Networks LLC, the CenturyLink LECs, Consolidated Communications, Inc., Cox Communications, Inc., FairPoint Communications, Inc., Frontier Communications Corporation, LICT Corporation, Time Warner Cable Inc., Windstream Corporation, the Iowa RLEC Group, and the Missouri RLEC Group*, WC Docket No. 14-228 (filed Nov. 10, 2014), p. 2.

other negotiated agreement with the LEC) is subject to access charges—and an IXC's historical payment of such charges without dispute is evidence that the access arrangement was entered into voluntarily.

2. The Commission's prior orders confirm that: (i) absent a LEC's agreement to an alternative billing arrangement, any traffic routed through an IXC and utilizing a LEC's access facilities is access traffic exchanged between the IXC and the originating/terminating LEC and may be treated as such; and (ii) where traffic is routed via an IXC (and, in turn, through a LEC's access facilities) the IXC bears the burden of demonstrating that the LEC has agreed to exempt the traffic from the access charges.
3. Where a LEC makes access facilities (e.g., Feature Group D trunks) available pursuant to switched access tariffs, an IXC that orders and routes or receives traffic (even intraMTA traffic) through those access facilities must pay tariffed rates in connection with such traffic if provided, consistent with duly filed tariffs.
4. It is unjust and unreasonable for an IXC to engage in self-help by refusing to pay access charges incurred in connection with unrelated, undisputed traffic in order to award itself a de facto refund of payments already made in connection with intraMTA wireless traffic routed via a LEC's access facilities.

See Petition at pp. 8-9.

The Petition for Declaratory Ruling has been filed, primarily, as a response to nationwide disputes, litigation and self-help efforts initiated by Sprint Communications Company, L.P. ("Sprint") and MCI Communications Services, Inc. ("Verizon").³ The claims made and actions demanded by Sprint and Verizon as part of their many disputes and lawsuits are virtually identical in every state. Generally, Sprint and Verizon are asking the impacted ILECs to accept and the federal courts to determine that: (1) *all* intraMTA traffic is *local* traffic regardless of the fact that it has been routed over a LEC's switched access facilities; and (2) because intraMTA traffic can be only local traffic, IXCs may avail themselves of a billing regime that, to date, has been applicable to only local carriers, i.e., reciprocal compensation, without regard to whether the IXCs have first taken action to cooperate with originating or terminating LECs and affected

³ The lawsuits were initiated by Sprint and Verizon's long distance divisions.

CMRS providers to establish interconnection and reciprocal compensation arrangements that allow for the appropriate routing and identification of intraMTA “Non-Access Telecommunications Traffic.”⁴

1. Background

A correct and fair resolution of the intercarrier compensation-related issues presented by the filed Petition is important to all LECs and is especially critical to SDTA’s rural ILEC members which are smaller entities operating in very low density, high-cost rural areas.⁵ All of the SDTA member companies continue to receive a significant percentage of their total revenues from intercarrier compensation and rely on such revenues to support continuing network investment plans and to keep end user rates, for both essential basic and advanced services, affordable. As rural carriers operating in smaller, high cost markets with universal service and carrier of last resort obligations, the SDTA member companies also are tied to longer term network investment plans and must obtain longer term financing in provisioning their telecommunications and information services and, consequently, depend greatly on some reasonable measure of stability relative to the existing intercarrier compensation and universal service mechanisms. This Commission gave some recognition to the need of rural rate-of-return carriers for stability when, as part of its universal service and intercarrier compensation *USF/ICC Transformation Order*, it adopted: (1) a “transition path” of eight years (beginning in 2012 and ending in 2020) for purposes of reducing terminating switched end office and transport rates and

⁴ See 47 C.F.R. 51.701(defining Non-Access Telecommunications Traffic).

⁵ The SDTA member companies serve approximately 75% of South Dakota, their respective service territories covering approximately 62,000 square miles. The average population density of the area served is approximately 3 people per square mile. Notably, the South Dakota member companies collectively own more than 30,000 plus miles of buried fiber optic line and supply broadband service to more than 300 South Dakota communities, most having populations of less than 1,000.

reciprocal compensation rates charged by local exchange carriers; and (2) an ICC recovery mechanism to replace certain terminating access charge reductions.⁶

The *ICC/USF Transformation Order* was intended to lay out a well-defined transition path for the benefit of both LECs and IXC.⁷ However, despite this intent, the SDTA member ILECs are actually seeing a greater, not lesser, number of switched access billing disputes. Larger IXCs, Sprint, Verizon and Level 3 in particular, are now more than ever proceeding without any regard for existing state or federal switched access tariff provisions and utilizing “self-help” as a means of leveraging their market power to the particular detriment of rural rate-of-return carriers. These actions illustrate what appears to be a complete unwillingness on the part of these IXCs to recognize and accept the FCC’s transitional timeline for terminating switched access services.⁸ The IXCs appear determined to hasten the elimination of switched access charges, on their own schedule, by using “stretched” rule interpretations as justification to blatantly ignore switched access tariff provisions and raise meritless disputes. Since at least June 2013, the deliberate disregard demonstrated by the IXCs has been evident not only relative to the claimed intraMTA wireless traffic at issue in this proceeding, but also in regard to originating and terminating VoIP-PSTN traffic.⁹ In many cases, when raising a dispute over an access billing

⁶ See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶801 (2011) (the “*USF/ICC Transformation Order*.”)

⁷ See *USF/ICC Transformation Order*, 26 FCC Rcd 17663, ¶¶739, 793-805.

⁸ See *USF/ICC Transformation Order*, 26 FCC Rcd 17663, ¶813 (enumerating required changes to access tariffs).

⁹ The IXCs’ efforts to avoid rate-of-return carrier access charges altogether, despite this Commission’s access charge reform and substantial access charge reductions, is most directly confirmed by their past and continuing failure to complete calls into rural exchange areas. See, e.g., *In the Matter of Verizon*, 2015 FCC LEXIS 282, File No. EB-IHD-14-00014821 (January 26, 2015) (imposing fine on Verizon related to rural call completion issues); *In the Matter of Level 3 Communications, LLC*, File No. EB-12-IH-0087 (March 12, 2013) (resolving Enforcement Bureau’s investigation of potential violations of 47 U.S.C. §§ 201(b) and 202(a) for “call completion practices to rural areas[.]”).

or billings, the IXC's are not only refusing to make payment of charges related to their particular claim of the moment, but also billed minutes of use not even in dispute. This abusive self-help practice is especially difficult for smaller rural ILEC's to deal with, putting them in the position of having to accept completely unsupported settlement amounts or having to file a complaint with the state regulatory commission or in the courts to recover properly billed access charges. There is no set of circumstances under which these types of disputing actions are reasonable and they should be promptly stopped by Commission action.

At the time of this filing, almost all of the SDTA members are facing disputes from Sprint, Verizon and/or Level 3 regarding claimed intraMTA wireless traffic. Fourteen of the member companies have been sued in various federal courts.¹⁰ In some of these cases, the claimed damages sought from individual SDTA member ILEC's are in the hundreds of thousands of dollars.¹¹ The extensive and costly litigation initiated by Sprint and Verizon and the ongoing use of illegal self-help techniques by Sprint, Verizon and Level 3 based on their untenable intraMTA wireless claims, heighten the importance of this proceeding and require that this

¹⁰ The two actions filed by Sprint and Verizon in South Dakota are styled as:

Sprint Communications Company, L.P. v. Alliance Communications Cooperative, Inc., RC Communications, Inc., Venture Communications Cooperative, and Western Telephone Company, Case No. 14-4099, Federal District Court, District of South Dakota, Southern Division, and

MCI Communications Services, Inc. and Verizon Select Services, Inc. v. Alliance Communications Cooperative, Inc., City of Brookings D/B/A Swiftel; Farmers Mutual Telephone Company, Fort Randall Telephone Company, Golden West Telecommunications Cooperative, Inc., James Valley Cooperative Telephone Company, Jefferson Telephone Company, LLC, Knology Community Telephone, Inc., Northern valley Communications, LLC, Santel Communications Cooperative, Inc., TrioTel Communications, Inc. and Venture Communications Cooperative, Case No. 14-4139, Federal District Court, District of South Dakota, Southern Division.

¹¹ Based on the amounts Sprint demanded of each of the South Dakota LEC's, the period for which Sprint and Verizon seek recovery may well exceed applicable state and federal statutes of limitation. See, e.g., 47 U.S.C. § 415(c) (providing for a two year limitation period in cases involving federal tariff).

Commission act expediently to address both the legal and practical considerations raised by the Petition for Declaratory Ruling. SDTA believes the Petition appropriately defines the issues needing resolution by this Commission and expresses its support for the Petition and the positions advocated therein. We ask that this Commission act quickly on the Petition's request for a ruling and, in all respects, grant the relief requested.

2. The IntraMTA Rule and IXCs

In their South Dakota Complaints, Sprint and Verizon allege that South Dakota ILECs have violated 47 U.S.C. §§ 201(b), 206 and 207 by billing Sprint and Verizon access charges on intraMTA calls pursuant to their state and federal access tariffs. The arguments of the IXCs, suggesting that the ILEC practice of billing switched access on intraMTA traffic is not permitted under *any* circumstances, are clearly not supported by the existing FCC rules, orders and federal court rulings and should be summarily rejected through Commission action on the filed Petition.

In lawsuits filed across the country, the suing IXCs and the hundreds of impacted ILECs have already extensively briefed the relevant legal issues.¹² The legal arguments will not be repeated in whole here, but merely summarized at a high level.

First, the position of Sprint and Verizon that intraMTA traffic can never be subject to switched access charges rests on an interpretation of this Commission's rules and prior orders that is strained to the point of being illogical. Their arguments (and those of Level 3) are fundamentally flawed because the "intraMTA rule" and the reciprocal compensation rule provisions upon which it is based were never intended to address or apply to interexchange carrier (IXC) entities. While the FCC has made it clear that intraMTA traffic is local traffic, it has also very clearly indicated in its past decisions that the "intraMTA rule" relates only to the

¹² See Appendix B, South Dakota ILECs' Memorandum in Support of Motion to Dismiss.

compensation to be paid for traffic exchange services provided by and between a CMRS provider and a LEC.¹³ IXC's, unlike LEC's and CMRS carriers, perform intermediate carrier functions and do not themselves either "exchange" traffic with other carriers or originate or terminate their own wireline or wireless traffic.¹⁴ Simply stated, this Commission's rules do not address compensation arrangements made with intermediate or transiting carriers. Nothing in this Commission's rules, or in its prior orders, including both its *Local Competition and USF/ICC Transformation Orders* indicates otherwise. In addressing intraMTA traffic and reciprocal compensation, both Orders specifically address the exchange of traffic between CMRS carriers and LEC's, not IXC's and LEC's.¹⁵

Secondly, the arguments of Sprint, Verizon (and Level 3) must fail because they ignore the means by which wireline and wireless carriers have, to date, invoked application of the intraMTA rule and reciprocal compensation rates.¹⁶ Under the 1996 Communications Act and the rules promulgated thereunder, reciprocal compensation is to be paid pursuant to "reciprocal compensation arrangements" through the establishment of a negotiated contract between two

¹³ See *USF/ICC Transformation Order* at ¶¶976-1008 (stating that intraMTA calls "between a LEC and a CMRS provider [are] subject to reciprocal compensation obligations under Section 251(b)(5)."); *id.* at ¶1043 (noting that "most traffic between LEC's and CMRS providers is not subject to interstate access charges unless it is carried by an IXC"); *TSR Wireless LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166 at ¶31 (2000) (holding that "access charges rules [apply to intraMTA traffic] if carried by an interexchange carrier.")

¹⁴ See *Local Competition Order*, 11 FCC Rcd. 15499, ¶¶1034, 1043 (1996) (expressing intention to "preserve the current interstate access charge regime."); see also *USF/ICC Transformation Order*, ¶¶990, 1003-1008 (stating that "a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider" and that "intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier.").

¹⁵ See 26 FCC Rcd 17663 at ¶¶976, 980-81, 988.

¹⁶ See, e.g., 47 C.F.R. §§ 51.703(a) and 51.715, *et seq.* (providing the mechanisms for requesting and establishing different pricing); see also *Iowa Utilities Bd. v. FCC*, 210 F.3d 753, 801 (8th Cir. 1997) (holding that the 1996 Telecommunications Act is intended "to promote negotiated agreements").

carriers exchanging telecommunications traffic.¹⁷ In order to avail itself of reciprocal compensation rates, a carrier must request interconnection negotiations and, more specifically, a reciprocal compensation arrangement.¹⁸ The initiation of a negotiations process gives the interested contracting parties the ability to identify and agree upon the precise transport and/or termination services to be provided by each party (including points of interconnection) and also to establish appropriate compensation, including the ability to establish a bill-and-keep arrangement that complies with the 1996 Act and allows for a “mutual and reciprocal recovery by each carrier” of its costs.¹⁹ Once again, the related statutory and rule provisions addressing reciprocal compensation speak to arrangements between carriers exchanging telecommunications traffic, whether between LECs or between LECs and CMRS carriers, but not between LECs and IXC or CMRS carriers and IXCs. Nothing in the related statutes or rules suggest it is appropriate for an IXC to claim a right to reciprocal compensation, and certainly there can be no reasonable basis to make any such claim if the carrier has never requested or pursued negotiations for a reciprocal compensation arrangement with the ILECs that are allegedly

¹⁷ See 47 U.S.C. § 251(b)(5) and 47 U.S.C. § 252(d)(2).

¹⁸ See 47 U.S.C. § 252(a)(1) (describing initiation of negotiations and negotiation process); 47 C.F.R. §§ 20.11(a) and (e) (same).

¹⁹ See 47 U.S.C. § 251(d)(2) and also 47 C.F.R. § 51.709(c) which establishes a “Rural Transport Rule” providing as follows:

For Non-Access Telecommunications Traffic exchanged between a rate-of-return regulated rural telephone company as defined in § 51.5 and a CMRS provider, the rural rate-of-return incumbent local exchange carrier will be responsible for transport to the CMRS provider’s interconnection point when it is located within the rural rate-of-return incumbent local exchange carrier’s service area. When the CMRS provider’s interconnection point is located outside the rural rate-of-return incumbent local exchange carrier’s service area, the rural rate-of-return incumbent local exchange carrier’s transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point[.]

receiving or sending the intraMTA traffic.²⁰

3. The IXC's Requests for Refunds

In a manner entirely consistent with the Commission's established inter-carrier compensation rules, the South Dakota rural ILECs have lawfully billed the IXCs for their use of ILEC-provided switched access facilities. By their own admissions, Sprint and Verizon (and Level 3), in context of the intraMTA traffic issues, exist as interexchange or intermediate carriers and do not provide retail wireless services putting them in the position of directly originating or terminating telecommunications traffic. Thus, this Commission's intraMTA rule cannot apply and no refunds are owed for the past provided services.

Moreover, basic state law principles of implied contract and voluntary payment preclude the issuance of any refunds.²¹ Sprint and Verizon admit that they purchased services from the South Dakota rural ILECs, that they routed intraMTA wireless traffic over the ILECs' access trunks established for the routing of interexchange or non-local traffic, and that the ILECs billed them pursuant to their respective interstate and intrastate tariffs for access services.²² The IXCs further admit that they paid for these services from 1996 until they commenced the present

²⁰ See, e.g., 47 C.F.R. §§ 51.703(a) and 51.715, *et seq.* (providing the mechanisms for requesting and establishing different pricing).

²¹ See generally Appendix B, pp. 9-17.

²² The LECs' tariffs explain how access service is ordered. See generally LECA Tariff, §§ 5.1. (providing that "[a]n Access Order is an order to provide the customer with Switched Access or Access Related Service or to provide changes to existing services.") and (providing "[a] customer may order any number of services of the same type and between the same premises on a single Access Order) and (providing that a "customer shall provide to the [LEC] the order information required in 5.2 . . . and customer names and premises address(es);] billing name and address;] customer contact name(s) and telephone number(s) for the following provisioning activities: order negotiation, order confirmation, interactive design, installation and billing."); see also § 5.2.1(C) Said tariffs further explain how a customer ordering access service will be billed. A customer's "traffic to end offices will be recorded at end office switches or access tandem switches. Originating and terminating calls will be measured or imputed to determine the basis for computing chargeable access minutes." *Id.* at § 6.8.4.

litigation. Neither Sprint nor Verizon disputed any part of the bills (either the rates charged or the applicability of those rates) sent to them by the South Dakota ILECs until immediately prior to or at the time of commencement of their respective lawsuits. Sprint and Verizon's respective courses of conduct, for more than eighteen years, evinced a willing intent to pay for the services properly billed to them. The IXC's have no valid claim for any of the refunds they are seeking from the South Dakota rural ILECs.

4. Unlawful Self-Help by IXCs

Petitioners have outlined in their filing the extent to which Sprint and Verizon have unlawfully engaged in self-help in violation of Section 201(b) of the Act (which prohibits any common carrier practice that is "unjust or unreasonable."). The experiences of the SDTA member ILECs are very similar to those of Petitioners. South Dakotas' rural ILECs have faced similar unreasonable demands from the IXCs and, in response, have received no cooperation from the IXCs in attempts to resolve the billing disputes.

The intraMTA wireless-related disputes were first raised by the IXCs in spring 2014 with the issuance of demand letters to the South Dakota ILECs for substantial refunds. The letters seek refunds from the South Dakota ILECs in the tens and hundreds of thousands of dollars. The majority of the initial demands, if not all, failed to specify the time periods in dispute, the total minutes of use in dispute, or to otherwise provide any traffic information or call detail substantiating the IXCs' refund demands. The disputes, as presented, failed to comply with the most basic of notice requirements explicitly provided for under the South Dakota rural ILECs' interstate and intrastate access tariffs, leaving the companies with no ability to even identify or reasonably investigate the basis for the claimed refund amounts.

In addition to claiming refunds, the demand letters directed the rural ILECs to

immediately implement certain provided intraMTA factors. These factors were unilaterally developed and provided by the IXC's with little, if any, explanation and without supplying any back-up data. No indication was or has ever been given as to whether the factors are based on traffic routed by all CMRS providers or whether all CMRS providers participated in the development of the provided intraMTA factors. In certain instances, the intraMTA factors provided by the IXC's are as high as 80-90% and yet the South Dakota rural ILEC's have been extended no opportunity to discuss or participate in the factor development process and are expected to simply implement the factors as unilaterally developed.

The initial demand letters of Sprint and Verizon also made it very clear that lawsuits either would be or had already been filed in federal court and would be formally served if the ILEC's failed to pay the whole of the refund demanded and implement the intraMTA factors, no questions asked, within thirty days. Even though the South Dakota rural ILEC's disagreed and continue to strongly disagree with the IXC's' interpretation of the intraMTA rule and related traffic exchange and reciprocal compensation rules and orders, the companies have requested (and continue to pursue) additional information from each IXC in an attempt to, in good faith, address the disputes raised. In responding to these demand letters, many of the South Dakota ILEC's requested legal authority for the IXC's' positions, as well as call detail supporting the provided intraMTA factors. The disputing-IXC's in all cases have ignored these ILEC requests or responded with information that is wholly inadequate or non-responsive.²³

Within days after the rural ILEC responses were sent, Sprint and Verizon filed well over

²³ In the instance of one IXC, it has issued a "Factor Guide" for LEC's. The Factor Guide purportedly explains how the IXC has arrived at its disputed amounts and developed the intraMTA factors that it dictated to the South Dakota ILEC's. Notably absent from the "Factor Guide" is any of the call detail used to develop and authenticate the factors

sixty lawsuits across the country, including two in the South Dakota federal district court.²⁴ The lawsuits filed by Sprint and Verizon in South Dakota, at present, name 14 of SDTA's 19 member ILECs as defendants. In both actions, Sprint and Verizon seek refunds, as well as a determination that the LECs' billing practices are illegal, thereby resulting in both a retroactive and prospective ban on billing access for intraMTA traffic. This litigation leaves each of the impacted rural ILECs with cash flow shortages in relation to legitimately billed switched access charges and, undoubtedly, will cost the rural ILECs tens of thousands of dollars in legal fees to defend.²⁵

Both in conjunction with and in spite of their still pending litigation, the IXC's have already withheld payment of billed access charges from many of the ILECs involved.²⁶ The IXC's cite two reasons for the withholding of the billed charges: (1) intraMTA traffic can never

²⁴ In several instances, the South Dakota ILECs named in the Verizon litigation learned of the lawsuit filed against them before they actually received Verizon's demand for refund.

²⁵ On August 15, 2014, the South Dakota ILEC defendants in the Sprint action filed a joint Motion to Dismiss Sprint's Complaint. See Appendix B. All briefing in connection with the Motion to Dismiss has been completed. A response is not yet due to the Verizon Complaint. Both matters have recently become more complex as they may now be transferred to the Northern District of Texas. In September 2014, CenturyLink requested that the Federal Multi District Panel on Litigation consolidate all of the lawsuits in which it is a named defendant and transfer those lawsuits to the Federal District Court for the Northern District of Texas. CenturyLink also gave notice of additional "tag along" actions addressing similar intraMTA issues, but in which CenturyLink is not a named defendant. These "tag along" actions include the South Dakota actions as CenturyLink is not a party in either the Sprint or Verizon action. In December 2014, the Joint Panel on Multidistrict Litigation transferred all of the cases in which CenturyLink is a named defendant and conditionally transferred all of the tag along actions, including those in South Dakota. The South Dakota ILECs have objected to transfer on the basis that their defenses will be different than those of CenturyLink's, particularly given that CenturyLink has asserted that it has agreements in place with Sprint and Verizon that address the specific issues being litigated and the South Dakota ILECs have no such agreements. If the South Dakota actions are transferred to Texas, the South Dakota ILECs will become but a handful of LECs in a group of over five hundred LEC defendants.

²⁶ Many of the monthly dispute notices sent to the South Dakota ILECs are inconsistent with the IXC's demands. Others have received disputes where the total minutes of use in dispute does not equal the amount withheld. In at least one instance, an IXC has misidentified the South Dakota ILEC, withholding sums based on another out-of-state LEC's OCN and minutes of use. Despite notice to the IXC's, none of these errors have been addressed. This lack of consistency, accuracy and responsiveness demonstrates the lack of care afforded to these critical matters by the IXC's.

be subject to access; and (2) the South Dakota ILECs have failed to implement the intraMTA traffic factors dictated by the IXC's. Until such time as this Commission or a Federal Court puts a stop to the increasingly prevalent self-help practices used by the IXC's, the IXC's will most certainly continue to withhold payment on legitimate access billing from ILECs. SDTA urges the Commission, in responding to the filed Declaratory Ruling, to make perfectly clear that the type of unlawful self-help actions being taken by Sprint, Verizon and Level 3 are in violation of existing tariffs and federal law.

CONCLUSION

The many disputes raised by the IXC's concerning intraMTA wireless traffic, their unlawful resort to self-help, and the filed lawsuits seriously threaten the ability of the South Dakota ILECs to collect legitimate access fees, make appropriate network investments, and meet the universal service requirements imposed by this Commission in relation to broadband services provided by "eligible telecommunications carriers." As noted earlier, the access "Transition Plan" developed by the Commission as part of its *ICC/USF Transformation Order* is especially critical to continued rural carrier operations and investment. The actions of Sprint, Verizon and certain other IXC's are not only unsupported by the Commission's rules and prior orders related to intraMTA traffic compensation and arrangements, they are also contrary to and violate the integrity of the Commission's established "Transition Plan." Based on the foregoing, SDTA respectfully requests that this Commission grant all relief as outlined in the Petition.

Dated: February 9, 2015.

Respectfully submitted,

Richard D. Coit, General Counsel
South Dakota Telecommunications Association
320 East Capitol Avenue
Pierre, SD 57501
(605) 224-7629 – telephone
richcoit@sdtaonline.com

By:



Meredith A. Moore
Cutler Law Firm, LLP
100 N. Phillips Avenue, 9th Floor
Sioux Falls, SD 57104
(605) 335-4950 – telephone
meredithm@cutlerlawfirm.com

Attorneys for South Dakota Telecommunications
Association

Appendix A

APPENDIX A

Alliance Communications Cooperative

Beresford Municipal Telephone

CRST Telephone Authority

Faith Municipal Telephone

Fort Randall Telephone Company

Golden West Telecommunications Cooperative

Interstate Telecommunications Cooperative

James Valley Telecommunications Cooperative

Kennebec Telephone Company

Long Lines

Midstate Communications Cooperative

RC Technologies

Santel Communications Cooperative

Swiftel Communications

TrioTel Communications Cooperative

Valley Telecommunications Cooperative

Venture Communications Cooperative

West River Cooperative Telephone Company

West River Telecommunications Cooperative

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY,
L.P.,

Plaintiffs,

vs.

ALLIANCE COMMUNICATIONS
COOPERATIVE, INC., RC
COMMUNICATIONS, INC., VENTURE
COMMUNICATIONS COOPERATIVE, AND
WESTERN TELEPHONE COMPANY.

Defendants.

4:14-cv-04099-KES

**JOINT MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS
AND, IN THE ALTERNATIVE,
TO STAY SPRINT'S COMPLAINT
PENDING INTERCONNECTION
PROCESS OR REFER CERTAIN
ISSUES TO THE FEDERAL
COMMUNICATIONS COMMISSION**

COME NOW Alliance Communications Cooperative, Inc., RC Communications, Inc., Venture Communications Cooperative, and Western Telephone Company, by and through their counsel of record, and respectfully submit this Memorandum of Law in Support of their Motion to Dismiss and, In the Alternative, To Stay Sprint's Complaint pending resolution of the Section 251(a) and (b) and Section 252 interconnection and arbitration process initiated by Defendants or Refer Certain Issues to the Federal Communications Commission.

INTRODUCTION

In its Complaint, Sprint Communications Company, L.P. ("Sprint") asserts that it acts as an intermediary carrier in connection with the exchange of wireless communications between Commercial Mobile Radio Service ("CMRS") carriers and the Defendants. Sprint further asserts that since 1996 the law has precluded the Defendants from applying interstate and intrastate tariffed access charges to "CMRS" calls which originate and terminate in the same "Major

Trading Area” or “MTA.” Complaint at ¶1. Sprint claims that the Defendants have been on notice for years that these calls, otherwise known as intraMTA or local wireless traffic, are subject to a category of compensation other than access: reciprocal compensation. Despite this supposed knowledge, Sprint asserts that the Defendants have improperly billed Sprint for originating and terminating switched access charges on intraMTA calls from their interstate and intrastate switched access tariffs. Sprint states that it “seeks a refund of these improper charges and a judicial declaration that the Defendants should cease and desist this illegal practice.” Id.

The above-referenced action is but one of thirty-one actions Sprint has filed around the country since May 2014. The allegations asserted in each of the actions are largely identical. All of Sprint’s claims are predicated upon its statements that the Federal Communication Commission’s (the “FCC”) rules preclude assessment of access charges to intraMTA traffic. In fact, Sprint acknowledges that each of its claims raise “identical questions of law.” See Complaint at ¶29. Sprint’s own assertion makes this case particularly ripe for dismissal at this juncture. Upon close inspection of Sprint’s Complaint, it is evident that Sprint, as a matter of law, is not entitled to a refund for any of the traffic that is the subject of this action. Specifically, Sprint’s refund claims should be dismissed because it has waived its ability to pursue any alleged over-payments pursuant to the tariff and any harm it has suffered is the result of its own actions. To the extent that this Court determines that certain of Sprint’s claims are not ripe for dismissal at this time, it should defer action in this matter pending resolution of the Section 251(a) and (b) and Section 252 interconnection and arbitration process, or until such time as the FCC addresses issues related to the categorization and compensation of the traffic where long distance carriers such as Sprint are involved.

BACKGROUND

The Defendants are local exchange carriers (the “South Dakota LECs” or “LECs”). The South Dakota LECs provide telephone and other services through wireline facilities to the homes and businesses of their customers. See Complaint at ¶2. Sprint is an interexchange or long distance carrier.¹ Id. It operates a wireline telecommunications network through which it connects its customers at a national level. Id. The South Dakota LECs provide originating and terminating access services to Sprint for those customers who select Sprint as their interexchange carrier. Id. at ¶3. These calls are routed over the LECs’ Feature Group D access trunks.

Sprint also routes wireless calls for CMRS providers. Id. at ¶21. Wireless calls are those from a wireless end user to a wireline customer or calls from a wireline customer to a wireless customer. Id. at ¶3. Calls between a wireless customer and wireline customer that originate and terminate within the same Major Trade Area or “MTA” that are exchanged pursuant to an established interconnection agreement between the parties are categorized as intraMTA calls. Id. at ¶1, 6. Sprint acknowledges that wireless calls can be routed directly between the LEC and CMRS carriers or indirectly, “meaning the call traverses the network of an intermediate carrier (such as Sprint.)” Id. at ¶21. When intraMTA wireless calls are routed indirectly through Sprint, Sprint utilizes the LECs’ Feature Group D access trunks. Id.

There are essentially two categories of telecommunications traffic: local traffic and long distance traffic or access traffic. For long distance or access traffic LECs are paid access charges by long distance companies such as Sprint. Id. at ¶¶2, 3 and 4. Access charges are set by a LEC’s state and federal tariffs. For local traffic, the measure of compensation is set by

¹ Sprint Communications Company L.P. brings its claims in this action solely as a long distance carrier. Sprint does have wireless operations as well, but Sprint’s wireless activities are conducted under the name Sprint Spectrum L.P., which is a wireless carrier. Ensuring that Sprint is appropriately identified and treated as a long distance carrier in this action is critical to proper analysis of the issues raised under the Act.

negotiated or arbitrated agreements between the carriers and such measure of compensation is referred to as “reciprocal compensation.” *Id.* at ¶23; see also *Iowa Network Serv’s., Inc. v. Qwest Corp.*, 385 F.Supp.2d 850, 865 (S.D. Iowa 2005), *aff’d*, 466 F.3d 1091 (8th Cir. 2006).

Local traffic and access traffic can be broken down into four subcategories of traffic. Each of these sub-categories is recognized and regulated by the FCC and applicable state public utilities commission or regulatory agency. The sub-categories are: (1) local wireline traffic (traffic originated and terminated within a local calling area comprised of a single local exchange or group of exchanges and subject to compensation arrived at through negotiated or arbitrated agreements), *Id.* at ¶2; (2) intraMTA wireless traffic (traffic that has been designated by the FCC as “local” wireless traffic originated and terminated within the same MTA and subject to compensation arrived at through negotiated or arbitrated agreements), *Id.* at ¶6; (3) long distance or access wireline traffic (traffic that is originated or terminated outside the local calling area and compensated at access tariff rates), *Id.* at ¶2; and (4) interMTA wireless traffic (traffic that is originated and terminated within different MTAs and compensated at access tariff rates), *Id.* at ¶6.

One of the most significant issues apparent in the instant case is that Sprint commingled and routed what it claims to be intraMTA wireless calls over facilities provided for the exchange of access or long distance traffic. See Complaint at ¶22. Sprint did not notify the LECs that it was commingling wireless calls with long distance or access calls. Sprint simply chose to route and commingle all wireless calls, whether intraMTA or interMTA in nature, over the same

Feature Group D trunks.² Id. at ¶¶21-22. By routing the traffic over the LECs' Feature Group D trunks, Sprint hid the true nature of the traffic being exchanged.

Further, because Sprint routed the traffic over the LEC's Feature Group D access trunks, it thereby purchased switched access services listed in the South Dakota LECs' federal and state tariffs at regulated rates set forth in those tariffs.³ Id. at ¶22. This is true regardless of the nature of the traffic because it was Sprint that commingled and routed the various types of traffic over the LECs' trunk groups. Had Sprint wanted to avoid application of the LEC's tariffs, Sprint could have requested and chosen interconnection (as provided for in 47 U.S.C. §§ 251 and 252) for exchanging local traffic. However, Sprint made no request for interconnection. Thus, for *all* traffic routed by Sprint over the South Dakota LECs' Feature Group D facilities or trunk groups, the LECs invoiced Sprint in accordance with the applicable rates set forth in its tariffs on file with the Federal Communications Commission ("FCC") and the South Dakota Public Utilities Commission ("PUC"). Id. at ¶4; see also South Dakota Local Exchange Carriers Association "LECA" Tariff No. 1, § 5.2.1(c) (establishing ordering conditions for switched access service);

² According to the LECs' intrastate tariff, Feature Group D trunks or access "provides trunk side access to Telephone Company [LEC] end office switches." See LECA Tariff, § 6.8.1(A). "FGD is provided as trunk side switching through the use of end office or access tandem switch trunk equipment." Id. at § 6.8.1(C). The LEC "will establish a trunk group or groups for the customer at end office switches or access tandem switches where FGD switching is provided. When required by technical limitations, a separate trunk group will be established for each type of FGD switching arrangement provided." Id. at § 6.8.1(F).

³ The LECs' tariffs explain how access service is ordered. See generally LECA Tariff, §§ 5.1. (providing that "[a]n Access Order is an order to provide the customer with Switched Access or Access Related Service or to provide changes to existing services.") and (providing "[a] customer may order any number of services of the same type and between the same premises on a single Access Order) and (providing that a "customer shall provide to the [LEC] the order information required in 5.2 . . . and customer names and premises address(es); billing name and address; customer contact name(s) and telephone number(s) for the following provisioning activities: order negotiation, order confirmation, interactive design, installation and billing."); see also § 5.2.1(C). Said tariffs further explain how a customer ordering access service will be billed. A customer's "traffic to end offices will be recorded at end office switches or access tandem switches. Originating and terminating calls will be measured or imputed to determine the basis for computing chargeable access minutes." Id. at § 6.8.4.

Minnesota Local Exchange Carrier Tariff F.C.C. No. 73, § 5 (establishing requirements for ordering access services); Iowa Communications Alliance Access Service Tariff No. 1.⁴ Absent notice from Sprint to the contrary, the LECs' actions were appropriate.

Up until the commencement of this action, Sprint paid the access charges invoiced to it for its use of the South Dakota LECs Feature Group D trunks without dispute. Complaint at ¶1. In fact, Sprint has paid the South Dakota LECs' invoices for years – dating back to the implementation of the 1996 Telecom Act. Sprint did not inform the South Dakota LECs that certain of the traffic it routed over the Feature Group D facilities was wireless traffic ostensibly subject to a different rate of compensation. Sprint agreed to pay for the traffic, regardless of whether it was wireline or wireless traffic or local or access traffic. It was not until May 2014 that Sprint first disputed the invoices billed to it and the rates applied to the traffic at issue.

Sprint asserts that the FCC has made plain for years that intraMTA wireless traffic is not subject to access charges, that the Defendants "continue to assess tariffed switched access charges on Sprint in violation of law, and in breach of their interstate and/or intrastate access tariffs," and that Sprint has been significantly damaged by the LECs' illegal actions. *Id.* at ¶¶1, 7, 8. Sprint does not assert, however, that the LECs knew that the traffic traversing their respective networks was commingled intraMTA wireless and long distance traffic. Sprint does not allege that it made any attempt to differentiate between long distance traffic, including interMTA wireless traffic, and intraMTA wireless traffic. Sprint does not dispute that it must pay access charges to the South Dakota LECs for long distance traffic. Sprint also does not allege that the FCC or PUC has invalidated the LECs' tariffs.

⁴ The Defendants' state and federal tariffs are public documents on file with the FCC, South Dakota Public Utilities Commission, Minnesota Public Utilities Decision and Iowa Board of Utilities. This Court may consider such public documents in the context of a motion to dismiss. *See Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) (holding that a court "may take judicial notice of public records and may thus consider them on a motion to dismiss.").

Furthermore, Sprint does not allege that it attempted to avoid imposition of access charges for the traffic in question by ordering local trunking facilities from the South Dakota LECs or by identifying the intraMTA wireless calls that it routed over the South Dakota LECs' Feature Group D access trunks, which would have allowed Sprint to request negotiation of an interconnection and reciprocal compensation arrangement with the South Dakota LECs. *Id.* at ¶32. Such a request for interconnection and the establishment of local trunking facilities would have allowed for different treatment of such traffic, to the extent that different treatment is necessary, for both routing and billing purposes.

As a result of the FCC's USF/ICC Transformation Order, the tariffed intrastate and interstate access charges that the South Dakota LECs are allowed to charge have been decreasing since July 2012. However, pursuant to that same Order, the FCC made clear that there is no such limitation on the rates that carriers can assess for transit services.

Thus, the facts pleaded by Sprint make clear that after choosing to obtain service from the LECs through the LECs' access tariffs, Sprint now seeks to deprive the LECs of any revenue for the service provided by claiming that the LECs should have been billing for services through a different mechanism – even though Sprint failed to provide the information necessary for the LECs to do so. Sprint's action and inaction in this case are telling.

ARGUMENT AND ANALYSIS

I. Standard of Review.

"A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the complaint." *Waldner v. N. Am. Truck & Trailer, Inc.*, 277 F.R.D. 401, 405 (D.S.D. 2011) (citing *Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010)). A viable complaint "must include enough facts to state a claim to relief that is plausible on its face." *Waldner*, 277

F.R.D. at 405 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A “complaint must contain ‘more than labels and conclusions.’” Id. (citing Twombly at 555). “The complaint must contain ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” Id. (citing Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are wholly insufficient to support a viable cause of action. Ashcroft, 556 U.S. at 672, 129 S.Ct. at 1940).

II. Sprint’s Complaint Fails to State Any Viable Claims for Relief.

Sprint’s Complaint fails to state any claims upon which relief may be granted. Accordingly, the Complaint should be dismissed.

A. Sprint fails to state a claim for action under Section 201(b) of the Act.

In Count 1 of the Complaint, Sprint claims that Defendants “engaged in an unjust and unreasonable practice in connection with their duties as common carriers under Section 201(b), namely: Defendants each improperly billed Sprint originating and terminating switched access charges from their interstate tariffs on interstate, intraMTA calls.” See Complaint at ¶35. In support of its allegation, Sprint states that “a LEC engages in an unjust and unreasonable practice under Section 201(b) when it (a) bills an interexchange carrier for tariffed access charges without a basis to do so under its tariff” or “(b) charges a carrier for intraMTA CMRS traffic from the LEC’s network.” Id. at ¶37.

However, it is clear from Sprint’s own recitation of the facts that the LECs had a basis to bill Sprint tariffed access charges because Sprint ordered access services from the LECs, Sprint commingled intraMTA traffic with access traffic and routed it over the LECs’ Feature Group D

Facilities; Sprint did not advise the LECs that it was routing intraMTA traffic over Feature Group D access facilities; and Sprint paid the access charges assessed for this traffic for many years without dispute. Further, by its own admission, Sprint is an interexchange carrier and transiting carrier and it does not provide wireless service. Accordingly, there is no basis to assert that the LECs could not assess access charges to Sprint or, conversely, that the LECs should have known that they were assessing access charges for intraMTA traffic.

B. All of Sprint's claims for refund are barred by its voluntary payment of the Defendants' invoices.

As the premise underlying all of its claims, Sprint asserts that "intraMTA calls are never subject to switched access charges." See generally Complaint, §A. This bold legal conclusion underpins Sprint's claim for substantial refunds to the LECs. Even assuming as Defendants must for the purposes of this Motion that Sprint's claims are true, Sprint has waived its ability to collect those sums it makes claim for in its Complaint. Sprint agreed to pay the access charges billed to it and its claim for refund is barred by the law of implied contract or by application of the Voluntary Payment Doctrine. Accordingly, Counts 1, 2, 3, 4, and 5⁵ should be dismissed as a matter of law.

1. Sprint agreed to pay the access charges billed to it.

Counts 1 through 5 are based in contract. Sprint asserts that both the interstate and intrastate tariffs filed by the South Dakota LECs constitute contracts and that the LECs have breached those contracts by billing Sprint access charges on intraMTA calls in accordance with their tariffs. Said breaches have resulted in corresponding alleged breaches of 47 U.S.C.

⁵ Sprint's Complaint identifies two counts as "Count V," the first of which is titled "(Breach of Contract/Intrastate IntraMTA Calling (Minnesota)) (Against Defendant Alliance Communications)" and the second of which is titled "(Breach of Contract/Intrastate IntraMTA Calling (Iowa)) (Against Defendant Alliance Communications)."

§§ 201(b), 206 and 207. However, all of these causes of action fail for the same reason: Sprint knowingly availed itself of the South Dakota LECs' tariffs for the exchange of traffic, including intraMTA wireless traffic, it paid the contract rates, and it failed to dispute the charges. Its actions speak louder than its words.

In the first paragraph of its Complaint, Sprint states:

Since 1996, the Federal Communications Commission ("FCC") has made plain that CMRS calls which originate and terminate in the same "Major Trading Area" or "MTA" (i.e., intraMTA calls) are not subject to switched access charges. Despite this clear recitation of law, and reiteration of the point by the FCC and federal courts, the Defendants all charge Sprint originating and terminating switched access charges or intraMTA calls from their interstate and intrastate switched access tariffs."

See Sprint Complaint at ¶1. With regard to the intraMTA traffic at issue in this case, Sprint's argument requires a leap in logic. Sprint is an intermediate or transiting carrier and not a carrier which itself originates or terminates wireless or wireline traffic. While Sprint argues that the FCC has made clear that intraMTA traffic is local traffic not subject to access charges, but rather reciprocal compensation, what Sprint fails to mention is that the FCC's "reciprocal compensation rules do not directly address the *intermediary carrier* compensation to be paid[.]" Iowa Network Svc's., 466 F.3d at 1096. These rules relate to the compensation to be exchanged between a CMRS provider and a LEC. See, e.g., 47 C.F.R. § 51.703(a) (providing that "[e]ach LEC shall establish Non-Access Reciprocal Compensation arrangements for transport and termination of Non-Access Telecommunications Traffic with any requesting telecommunications carrier.")

In similar fashion, Sprint's reliance on the FCC's 2011 *Connect America Fund Order* is misplaced. See Complaint at ¶28 (quoting *In re Connect America Fund*, 26 FCC Rcd 17663 (2011) (Report and Order and Notice of Further Rulemaking, *final rules published*, 76 Fed. Reg. 73830 (Nov. 29, 2011), *recon. in part*, 2011 WL 6778613 (Dec. 23, 2011) (the "Connect

America Order”). The portions of the Connect America Order to which Sprint cites address the exchange of traffic between wireless (CMRS) carriers and LECs, not between IXC and LECs. See 26 FCC Rcd 17663 at ¶¶976, 980-81, 988. Those quotations from the Order cannot be viewed as dispositive of the relationship and compensation obligations between Sprint and the South Dakota LECs in this case.

Moreover, reciprocal compensation has historically been paid pursuant to a negotiated contract between two carriers. See Iowa Utilities Bd. v. FCC, 210 F.3d 753, 801 (8th Cir. 1997) (holding that the 1996 Telecommunications Act is intended “to promote negotiated agreements”). Absent a negotiated agreement, there is nothing that precludes a carrier from voluntarily paying, through its own actions, either more or less for a service than it may have otherwise been compelled to pay. That is exactly what Sprint did in this case. Sprint did not request a negotiated agreement. Absent such a request, the LECs were not obligated to provide Sprint with different pricing. See, e.g., 47 C.F.R. §§ 51.703(a) and 51.715, *et seq.* (providing the mechanisms for requesting and establishing different pricing). Up until the commencement of this action, Sprint paid the South Dakota LECs’ tariffed rates.

Contracts are created not only by words, but also actions. South Dakota Codified Law 53-1-3 provides that “[a] contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct.” In Weller v. Spring Creek Resort, Inc., 477 N.W.2d 839, 841 (S.D. 1991) the South Dakota Supreme Court held:

A contract is implied in fact where the intention as to it is not manifested by direct or explicit words by the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction.

(quoting Mahan v. Mahan, 80 S.D. 211, 215, 121 N.W.2d 367, 369 (1963)). The question to be asked is: “whether the facts and circumstances properly evaluated permit an inference that services were rendered in expectance by one of receiving and the other of making compensation.” Mahan, 80 S.D. at 215, 121 N.W.2d at 369. The South Dakota Supreme Court has further noted that the “facts are viewed objectively and if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind.” Weller, 477 N.W.2d at 841 (quoting Federal Land Bank of Omaha v. Houck, 68 S.D. 449, 463, 4 N.W.2d 213, 219-20 (1942)).

By its own statements in the Complaint, Sprint admits that it purchased services from the South Dakota LECs, that it routed intraMTA wireless traffic over the LECs’ access trunks established for the routing of interexchange or non-local traffic, and that the LECs billed Sprint pursuant to their respective interstate and intrastate tariffs for access services. See generally Complaint. Sprint also admits that it paid for these services from 1996 until it commenced this litigation. It did not dispute any part of the bills (either the rates charged or the applicability of those rates) sent to it by the LECs until immediately prior to the commencement of this litigation. It is plain from the face of the Complaint that Sprint’s course of conduct for more than eighteen years evinced a willing intent to pay for the services billed to it.

Critically, the existence of this implied contract precludes the refund which Sprint now seeks. In support of its arguments on the compensation issue, Sprint relies heavily upon the case of Iowa Network Services, Inc. v. Qwest Corporation, 466 F.3d 1091 (8th Cir. 2006) (“INS II”). The very law upon which Sprint relies, however, establishes that Sprint is not entitled to any refund.

INS II has its origins in an action involving Iowa Network Services or “INS,” which is a tandem service provider comprised of a collection of Iowa LECs (or an intermediary carrier), and Qwest (a long distance carrier acting as an intermediary carrier in this instance). Qwest routed both intraMTA wireless traffic and wireline traffic through facilities it purchased from INS. INS applied its tariffed access rates to the traffic. Qwest refused to pay the charges, asserting that reciprocal compensation, and not access charges, was the appropriate measure of compensation. Iowa Network Serv’s, Inc. v. Qwest Corp., 385 F.Supp.2d 850, 866 (S.D. Iowa 2005), *aff’d* by 466 F.3d 1091. INS thereafter sued Qwest for its unpaid invoices. Qwest then requested that the Iowa Utilities Board (“IUB”) decide the issue. The IUB ruled that the traffic at issue was local traffic and that the parties must negotiate an interconnection agreement under 47 U.S.C. § 252(b). Id.

Following the IUB’s directive to negotiate, INS amended its federal tariff to require payment of access charges on both interstate and intrastate calls placed by wireless callers. INS II, 466 F.3d at 1094. INS did not enter into negotiations for an interconnection agreement with Qwest, but rather commenced an action against Qwest in federal court. See Iowa Network Serv’s Inc. v. Qwest Corporation, 285 F.Supp.2d 850, 864 (S.D. Iowa 2005). INS asserted that its amended tariff controlled the measure of compensation and that the filed rate doctrine precluded Qwest from arguing that access charges did not apply. Id. The federal court concluded, and the Eighth Circuit Court of Appeals affirmed, that it was within the discretion of the IUB to characterize the traffic at issue as local and not subject to access charges. See Iowa Network Serv’s, Inc., 385 F.Supp.2d at 864, *aff’d* 466 F.3d at 1094. Both courts further confirmed that the IUB had the authority to order the parties to negotiate an interconnection agreement. INS II, 466 F.3d at 1096. Importantly, the Eighth Circuit stated that the FCC’s

reciprocal compensation rules “do not directly address the intermediary carrier compensation to be paid.” *Id.*

Regardless of the nature of the traffic at issue, the IUB ruled that Qwest was not entitled to a refund for traffic billed to it prior to the date of the IUB action. Specifically, the IUB stated:

Prior to April 12, 1999, Qwest ordered, used, and paid for [centralized equal access] and access services from INS and the independent LECs for this traffic. *The parties' actions demonstrate an agreement that the access charge tariffs were applicable up to a certain time, and that agreement should be enforced up to the moment that one of the parties (Qwest, in this case) unambiguously informed the other that the agreement was no longer in effect.*

In re Exchange of Transit Traffic, Docket No. SPU-00-7; TF-00-275; (DRU-00-2) Order Affirming Proposed Decision and Order, IUB Order at pp. 16-17 (the “IUB Order”) (emphasis added). The IUB determined that Qwest’s past payment of charges established a contract between the parties and that Qwest had obligated itself to payment of access charges pursuant to that contract. More specifically,

Before Qwest gave notice that it no longer considered the CEA and access charge tariffs applicable, the parties had agreed that those tariffs applied to this traffic, as evidenced by the fact that INS and the independent LECs billed Qwest pursuant to those tariffs and Qwest paid those bills.

When the wrong tariff is applied in a dispute between a regulated utility and a typical end-user, it may be appropriate to revisit and recalculate past bills to correct the error. *However, in a dispute between two telephone companies, each possessed of substantial subject matter expertise and a thorough understanding of the various circumstances applicable to the situation, it is more appropriate to enforce the parties' agreement regarding the applicable tariff (as evidenced by their actions), at least until one company has adequately notified the other that it no longer agrees regarding application of the tariff.* In this case, that notice was given so as to be effective in April of 1999.

IUB Order at pp. 17-18 (emphasis added). The IUB recognized that Qwest could not have it both ways. As such, the IUB took note of Qwest’s twenty years of payment of tariffed access

charges and noted that Qwest could not unilaterally and retroactively change the agreed-upon compensation arrangement between the parties. See INS II, 466 F.3d at 1096.

The INS cases are instructive. Sprint seeks to do here exactly what Qwest attempted to do in the INS cases. It should not be permitted the opportunity to do so. Sprint's actions for the last eighteen years establish that Sprint does not have a valid claim for refund in the instant case.

2. Sprint's claims are barred by the Voluntary Payment Doctrine.

Sprint's claims in Counts 1 through 5 are also barred by the Voluntary Payment Doctrine. The IUB essentially articulated the theory of the Voluntary Payment Doctrine in its rulings in the INS cases. This Doctrine is characterized as: "[A] long-standing doctrine of law, which clearly provides that one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment." Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P., 668 F.3d 1019, 1030, 2012 U.S. App. LEXIS 3383, 22, 2012 WL 539794 (8th Cir. Minn. 2012) (quoting Hanson v. Tele-Comm's, Inc., No. C7-00-534, 2000 Minn. App. LEXIS 1023, 2000 WL 1376533, at *3 (Minn. Ct. App. Sept. 26, 2000) (unpublished)). Often described as a "universally recognized" doctrine, the voluntary payment defense has been endorsed by the Supreme Court of South Dakota, which held that "the rule is well settled that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered on the ground that the claim was illegal or that there was no liability to pay in the first instance." Siefkes v. Clark Title Co., 88 SD 81, 86-87, 215 N.W.2d 648, 651 (1974). See also Curtis Lumber Co. v. La. Pac. Corp., 618 F.3d 762, 782 (8th Cir. 2010) (applying Arkansas law); Pure Oil Co. v. Tucker, 164 F.2d 945, 948 (8th Cir. 1947) (applying Iowa law); National Fire Ins. Co. of Hartford v. Butler, 152 N.W.2d 271, 273 (Iowa

1967); Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 426 (Iowa 1988); Morgan v. Jasper County, 274 N.W. 310, 311 (Iowa 1937)).

While the Voluntary Payment Doctrine is an affirmative defense, it is also an appropriate basis for dismissal at this stage of the proceedings. When it is clear from the face of the Complaint that a defense acts as a bar to the relief sought by the plaintiff, dismissal is appropriate. Blodgett v. Franco, 1999 U.S. Dist. LEXIS 23740, p. 33 (D.Minn. March 17, 1999) See Johnson v. Sprint Solutions, Inc., 2008 WL 2949253 (W.D.N.C. July 29, 2008) *aff'd* on other grounds, 357 F. App'x 561 (4th Cir. 2009) (holding that the voluntary payment doctrine is an appropriate basis for dismissal when the face of the complaint makes clear that the doctrine is applicable).

Sprint's Complaint is replete with admissions that it had long known that intraMTA traffic is not subject to access charges. In fact, it is mentioned on no less than ten occasions. See Complaint at ¶¶1, 7, 23, 25-29, 36, 37. In support of its argument, Sprint cites both to case law, as well as FCC decisions. By Sprint's own admissions, it had full knowledge of the facts, and despite said full knowledge, Sprint paid access charges from 1996 until at least May 2014. Absent from Sprint's Complaint is any indication that Sprint disputed, contested or otherwise refused to pay access charges at any time prior to May 2014. See Complaint at ¶¶1, 8, 20, 30, 31, 33, 35. (indicating that Sprint paid charges). Sprint knew what traffic was being routed over the LECs' Feature Group D access facilities. Sprint knew what charges the LECs were applying to this traffic. Despite this knowledge, Sprint paid the bills in full. Sprint also failed to take any of the available steps to request different routing and billing for the traffic it claims is at issue. Under these circumstances, the Voluntary Payment Doctrine applies and Sprint has waived its ability to demand a refund for these amounts. Unless there is fraud or

duress, the voluntary payment doctrine prohibits a person who voluntarily pays money with full knowledge of the facts from recovering the money.

C. Sprint failed to avail itself of 47 U.S.C. §§ 251 and 252.

Sprint has never requested interconnection with the Defendants nor has it requested a reciprocal compensation billing arrangement. Had Sprint believed that it was being improperly charged access for intraMTA traffic, it should have availed itself of the interconnection process outlined in 47 U.S.C. §§ 251 and 252 rather than ordering access services from the Defendants' tariffs. This is a particularly egregious oversight by Sprint because the reciprocal compensation provisions of the FCC orders upon which Sprint relies do not even address compensation for intermediate or transiting carriers. Sprint's failure to invoke these provisions acts as a bar to its claim for refund, as well as to its claim in Count 6 of its Complaint for declaratory relief.⁶

The Act was intended to promote the negotiation and establishment of agreements for the compensation of traffic. See Iowa Network Serv's., Inc. v. Qwest Corporation, 363 F.3d 683, 691 (8th Cir. 2004) (holding that the "1996 Act requires all ILECs to interconnect with a requesting telecommunications carrier for the transmission of telephone exchange service and to enter an interconnection agreement, including the establishment of reciprocal compensation arrangements for the transport and termination of communications."); see also 47 C.F.R. 51.703(a) (providing that "each LEC shall establish Non-Access Reciprocal Compensation arrangements for transport and termination of Non-Access Telecommunications Traffic with any

⁶ Declaratory judgment actions are typically utilized in order to determine the rights and duties between two parties. See Standard Casualty Co. v. Boyd, 75 S.D. 617, 71 N.W.2d 450 (1955). A party may seek declaratory relief to "afford security against uncertainty with a view toward avoiding litigation and settling rights before there has been irrevocable change of position." See Kneip v. Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974). Sprint may accomplish the same purpose as a declaratory judgment action by availing itself of the rights that it has under 47 U.S.C. §§ 251 and 252. Those rights have already been defined by the FCC in the appropriate regulations; court intervention is not necessary. As such, since Sprint has made no claim for interconnection and negotiated agreement, there is no actual controversy and its claim for declaratory relief is not ripe for action at this time.

requesting telecommunications carrier.”); see also 51.715, *et seq.* (providing that a LEC has no obligation to negotiate or provide interim pricing during negotiations absent a request for interconnection). Section 251(a) of the Act defines the specific process for the negotiation and arbitration of interconnection agreements. The process is limited in time and scope with the expectation that the rules contained within Section 251(a) – (c) will promote efficiency and expedite the development of negotiated agreements. Both parties involved in any negotiation have a duty to provide for “rates, terms and conditions [that] are just, reasonable, and nondiscriminatory[.]” 47 U.S.C. § 251(c) and (d). Ultimately, the purpose of requests for interconnection and resulting agreements is to ensure that a carrier utilizing a LEC’s services may not evade its obligation to pay for those services and essentially use a LEC’s network for free.

Had Sprint wanted to establish a different rate of compensation for the traffic at issue, Sprint not only had the Act upon which to rely for guidance, but also the INS II case, which it cites so frequently in its Complaint, in which the IUB ordered the parties to negotiate an interconnection agreement. Sprint failed to take these affirmative steps and cannot now claim that it was entitled to use the South Dakota LECs’ networks for free.

D. Sprint’s Claims are barred by the Filed Rate Doctrine.

Tariffs are not mere contracts; the tariffs and the terms contained therein represent the law. Every common carrier must file tariffs, whether with the FCC or appropriate state regulatory agency. See 47 U.S.C. § 203(a); SDCL §§ 49-31-18 and 49-31 -19. Under the filed rate doctrine, tariff rates “have the force of law and are absolutely binding upon all users until found invalid in an FCC proceeding or by a federal court.” See Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127, 110 S.Ct. 2759, 2766, 111 L.Ed.2d 94 (1990) (defining

filed rate doctrine); Gross Common Carrier, Inc. v. Baxter Healthcare Corp., 51 F.3d 703, 706 (7th Cir. 1995).

Sprint has alleged that the LECs tariffs are “*ultra vires*” and “unenforceable.” See Complaint at ¶¶42, 43. Sprint’s argument is essentially that various rulings issued by the FCC since the implementation of the 1996 Act have rendered the LECs’ tariffs obsolete and unenforceable. This allegation is nonsensical. The purpose of the filed rate doctrine is to protect primary jurisdiction of an agency over reasonableness of rates charged and to ensure that regulated utilities charge only the rates which an agency is aware of or has approved.

Sprint’s argument that the tariffs are “*ultra vires*” and “unenforceable” is essentially a collateral attack on contracts already approved. Sprint does not argue that the interstate and intrastate tariffs at issue are not otherwise valid as they relate to traffic *other* than intraMTA wireless traffic. Sprint does not argue that it has ever challenged the access rates set forth in the South Dakota LECs’ tariffs. Accordingly, the LECs’ tariffs remain in full force and effect.

Finally, it cannot be overlooked that a LEC bills a carrier for the service that carrier purchases under the tariff, not for the type of traffic for which the customer uses the service. By ordering switched access trunks from the defendant LECs and routing its traffic over those trunks, Sprint undertook an obligation to pay the switched access rates established by the filed tariffs, whether the routed traffic was long distance or local. Under these circumstances, Sprint is not entitled to a refund as a matter of law.

E. Sprint’s claims are barred by the equitable doctrine of laches.

Sprint’s claims are also barred by the equitable doctrine of laches. As with the Voluntary Payment doctrine, dismissal is appropriate when it is clear from the face of the Complaint that a defense acts as a bar to the relief sought by the plaintiff. Sprint’s Complaint more than makes

plain on its face that dismissal pursuant to the doctrine of laches is appropriate. Sprint's oft-repeated claims that intraMTA traffic is not subject to access charges are again telling and Sprint should not be permitted to raise these claims after knowingly sitting on its alleged rights for years.

The elements of laches are well established: "the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804-806 (8th Cir. 1979) (citing Gardner v. Panama Railroad Co., 342 U.S. 29, 31, 72 S.Ct. 12, 96 L.Ed. 31 (1951); Russell v. Todd, 309 U.S. 280, 287, 60 S.Ct. 527, 84 L.Ed. 754 (1940); Southern Pacific Co. v. Bogert, 250 U.S. 483, 490, 39 S.Ct. 533, 63 L.Ed. 1099 (1919)). A reviewing court must consider "all the particular circumstances of each case[,] including the length of delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action." Hot Stuff Foods, LLC v. Mean Gene's Enters., 468 F.Supp.2d 1078, 1092-93 (D.S.D. 2006) (citing Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Dept. of Energy, 683 F.2d 1171, 1174 (8th Cir. 1982)); see also The Key City, 81 U.S. 653, 660, 20 L.Ed. 896 (1871) (holding that "no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.").

As outlined throughout the entirety of this Memorandum, Sprint states that it has known for years, even dating back to 1996, that intraMTA traffic is not subject to access charges. See Complaint at ¶¶1, 7, 23, 25-29, 36, 37. Moreover, Sprint cannot claim that it has brought this claim within the applicable statute of limitation. As outlined in Section E below, the applicable statute of limitation for claims based upon federal tariffs and premised upon federal law is two-

years. See 47 U.S.C. § 415(c). Based on Sprint's own assertions, as well as the applicable statute of limitation, there is no justifiable excuse for its delay in bringing these claims.

The LECs will be subjected to significant prejudice if this lawsuit is allowed to proceed. It again bears repeating that Sprint has made no attempt to date to avail itself of provisions in federal and state law that would have allowed it to request interconnection. Had Sprint done so, it could have requested different treatment (for both routing and billing purposes) for the traffic which it commingled on the LECs' trunk groups. The lack of any request from Sprint made it impossible for the South Dakota LECs to treat the traffic at issue differently. Questions of proof now become an issue for the LECs if Sprint is allowed to pursue its claim. Sprint effectively seeks to capitalize on its own inaction. Under these circumstances, the whole of Sprint's Complaint should be dismissed.

F. In the alternative, Sprint's claims for refunds are barred by the two-year statute of limitation contained in 47 U.S.C. § 415 (b) and (c).

In the event that this Court does not determine that all of Sprint's claims for refund are barred, those claims should be limited to a two-year period from the date of Sprint's demand for refund. Federal law provides for a two year limitation period in cases involving federal tariff. See 47 U.S.C. § 415(b) and (c).⁷

⁷ Section 415(b) provides:

All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

Section 415(c) provides:

For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presenting in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in

Under this statute, a customer seeking to dispute an invoice or billing practice must make a claim in writing to the carrier or otherwise file an action to preserve the two-year statute of limitation. Sprint first disputed the South Dakota LECs' application of access charges to intraMTA traffic in May 2014. Sprint therefore cannot claim refund for any period prior to May 2012.

Moreover, this same statutory limitation applies to any claims relating to the South Dakota LECs' intrastate tariffs. Sprint relies exclusively on FCC rulings and federal law. Any claim for a longer statute of limitation under state law is therefore preempted. See Firstcom, Inc. v. Qwest Communications, 618 F.Supp.2d 1001, aff'd, 555 F.3d 669 (8th Cir. 2009). Accordingly, all of Sprint's claims, to the extent not barred by the arguments set forth in Sections A and B herein, are barred beyond May 2012.

G. If dismissal is not granted, the Complaint should be held in abeyance pending the establishment of alternative processes, as requested in Count IX of the Complaint.

The South Dakota LECs believe that the entirety of this matter can be resolved through dismissal. However, to the extent that this Court determines that dismissal is not warranted, Defendants request that the Court hold the Complaint in abeyance pending the establishment of prospective alternative compensation mechanisms between Sprint and the LECs. In its request for Declaratory Relief in Count IX, Sprint asks the Court to declare that "[e]ach Defendant must either create a process that does not assess switched access charges on intraMTA calls, or use a traffic study, as contemplated by First Report and Order ¶1044, to assess the percentage of its calling that is intraMTA and prospectively submit access bills that subtract that percentage of calling from the access invoices submitted to Sprint." Defendants are willing to establish a

writing is given by the carrier to the claimant of disallowance of the claim, or any part of parts thereof, specified in the notice.

process for prospective use as requested by Sprint. Accordingly, if dismissal is not granted, the South Dakota LECs request that the Complaint be held in abeyance.

H. If dismissal is not granted, referral to the FCC and deferral pending FCC action is appropriate.⁸

While the South Dakota LECs believe that the entirety of this matter can be resolved through dismissal, they also recognize that resolution of the issues raised by Sprint may implicate certain regulatory and policy considerations. To the extent that this Court determines that certain issues require resolution by the FCC, the LECs respectfully request that this Court refer those issues to the FCC under the primary jurisdiction doctrine and defer ruling on any remaining issues pending ruling by the FCC.

“Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making.” Sprint Spectrum L.P. v. AT&T Corp., 168 F.Supp.2d 1095, 1097-98 (W.D. Mo. 2001) (quoting Access Telecomms. v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998)). Referral to an administrative agency is appropriate when a case raises issues “not within the conventional experience of judges” or where cases require “the exercise of administrative discretion.” See Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005). When determining the applicability of the doctrine, the court must examine “whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created.” Sprint Spectrum L.P., 168 F.Supp.2d at 1097 (quoting U.S. v. Western Pac. R.R., 352 U.S. 59, 63 (1956)). Courts typically employ two questions when conducting their analysis: (1) whether the issues raised in the pleadings “have been placed within the special competence of an administrative body” and (2) whether “a case poses the

⁸ Defendants Venture Communications and Western Telephone Company do not concur in the request for referral to the FCC.

possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy.” Sprint Spectrum L.P., 168 F.Supp.2d at 1098.

Sprint has requested that this Court retroactively deem the South Dakota LECs tariffs unenforceable. It has also requested that this Court deny compensation to the LECs for this traffic going forward. See Complaint at ¶¶64-66. Sprint can point to no authority in the Act or the FCC rulings upon which it relies that permits this Court or the FCC to retroactively invalidate a tariff or prospectively modify it. The case law is well established that if the interpretation of a tariff is straightforward, there is no need to apply the primary jurisdiction doctrine. Because Sprint has failed to state any valid claim within its Complaint, this matter need not be referred.

To the extent, however, that Sprint must engage in technical machinations to support its argument and to the extent that Sprint’s claim for declaratory ruling implicates a prescribed course of future treatment for intraMTA traffic, those arguments necessarily impact not only the historical and future application of the LECs’ tariffs, but also the categorization and compensation of certain types of traffic. When it is necessary to determine the meaning or proper application of a tariff or to otherwise rule upon policy issues, such issues should first be presented to the appropriate administrative agency. See Splitrock Properties v. Qwest Communications, 2010 U.S. Dist. Lexis 73057, 16-17 (South Dakota S.D. 2010) (additional citations omitted). See also Access Telecomms. v. Southwestern Bell Tel. Co., 137 F.3d 605, 609 (8th Cir. 1998) (holding that FCC referral was appropriate because the issues raised in litigation requiring ruling on the reasonableness of a telecommunications practice). If this Court determines that referral is appropriate, it should refer the following questions to the FCC and stay this action pending resolution:

- (1) Whether the FCC’s Orders and rulings to date, namely the 1996 Act and the 2011 Connect America Order eliminate the need for IXC’s or other

telecommunications carriers to request interconnection pursuant to 47 U.S.C. §§ 251 and 252 for the exchange and compensation of intraMTA traffic.

- (2) Whether the FCC's Orders and rulings to date, namely the 1996 Act and the 2011 Connect America Order eliminate the need for IXC's or other telecommunications carriers to establish a mechanism to reasonably identify, distinguish, and quantify commingled access and intraMTA traffic exchanged over switched access trunks such that appropriate compensation can be determined for each type of traffic.
- (3) Whether the FCC's non-access reciprocal compensation arrangement provisions, including the provisions addressing "bill and keep," are intended to address compensation obligations between wireline local exchange carriers and intermediate carriers providing transit services.
- (4) Whether and to what extent the provisions of 47 C.F.R. Subsection § 51.709(c), adopted in 2011 by the FCC, which limit the transport and transiting responsibilities of rural rate-of-return regulated incumbent local exchange carriers in regard to traffic exchanged with CMRS providers, impact reciprocal transport and termination obligations, including billing and payment obligations.

Again, referral is not necessary given Sprint's significant overreaching in this case; however, if appropriate, referral of certain narrowly defined issues may be appropriate so as to clarify issues of process and compensation.

CONCLUSION

Sprint created its present circumstances. It now seeks this Court's permission to use the South Dakota LECs' respective networks for free — both retroactively and prospectively. Sprint's allegations, however, are painted with far too broad a brushstroke and simply do not survive the well-pleaded complaint rule and the well-established principles of Rule 12(b)(6). Accordingly, the South Dakota LECs respectfully request that this Court dismiss the entirety of Sprint's Complaint with prejudice.

ORAL ARGUMENT IS RESPECTFULLY REQUESTED PURSUANT TO LOCAL RULE 7.1(C).

Dated this 15th day of August, 2014.

CUTLER & DONAHOE, LLP

/s/Meredith A. Moore
Meredith A. Moore
100 N. Phillips Avenue, 9th Floor
Sioux Falls, SD 57104-6725
Telephone: (605) 335-4950
E-Mail: meredithm@cutlerlawfirm.com

-AND-

Darla Pollman Rogers
Margo D. Northrup
Riter, Rogers, Wattier & Northrup, LLP
319 S. Coteau - P. O. Box 280
Pierre, SD 57501-0280
E-mail: dprogers@riterlaw.com
m.northrup@riterlaw.com

CERTIFICATE OF COMPLIANCE

I, Meredith A. Moore, certify that Defendants' Memorandum of Law in Support of Motion to Dismiss and, In the Alternative, to Stay Sprint's Complaint Pending Interconnection Process or Refer Certain Issues to the Federal Communications Commission complies with Local Rule 7.1(b)(1).

I further certify that in preparation of this Memorandum, I used Microsoft Office Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes and quotations in the following word count.

I further certify that the above-referenced Memorandum contains 8,529 words.

/s/ Meredith A. Moore